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## Rebalancing Privacy and Freedom of Expression

The recent judgments of the Grand Chamber of the European Court of Human Rights (ECtHR) in *Axel Springer AG v Germany*<sup>1</sup> and *von Hannover v Germany (No 2)*<sup>2</sup> have been hailed as good news for the media. Both cases involved alleged intrusion by the press into the private life of high-profile individuals, and accordingly they entailed the now familiar “balancing exercise” between article 8 of the European Convention on Human Rights, giving the right to respect for private life, and article 10, protecting freedom of expression. In both cases the latter was judged to prevail over the former. Comparisons have been drawn with previous case law in which the outcome for the individual was very different, notably *von Hannover v Germany (No 1)*<sup>3</sup> and the English case, *Campbell v MGN*.<sup>4</sup> So, do these latest cases point to a rebalancing exercise in Strasbourg?

<sup>26</sup> See, for instance, the decision of the Supreme Court of Canada in *Design Services Ltd v Canada* [2008] 1 SCR 737.

<sup>27</sup> See the line of cases based upon *Walker v Milne* (1823) 2 S 379.

<sup>1</sup> App No 39954/08, 7 Feb 2012.

<sup>2</sup> Apps No 40660/08 and 60641/08, 7 Feb 2012.

<sup>3</sup> (2005) 40 EHRR 1.

<sup>4</sup> [2004] 2 AC 457.

### A. BALANCING ARTICLES 8 AND 10: THE KEY PRINCIPLES

A useful feature of the two cases is that the ECtHR took the opportunity to restate the key principles governing the interrelationship between articles 8 and 10:

- 1) The press has an “essential” role as “public watchdog”, meaning that it has a duty to impart, and the public a “right to receive”, “information and ideas on all matters of public interest”.<sup>5</sup> Moreover, journalistic freedom requires that the media should be permitted “possible recourse to a degree of exaggeration, or even provocation”.<sup>6</sup>
- 2) Articles 8 and 10 command “equal respect”. In consequence, it should make no difference to the outcome of applications like those in *Springer* and *von Hannover* whether they are brought under article 10 by the publisher or under article 8 by the individual.<sup>7</sup>
- 3) Contracting States enjoy a margin of appreciation in assessing whether interference with freedom of expression is necessary in terms of article 10(2), but the ECtHR case law demonstrates certain core criteria to be significant, namely:<sup>8</sup>
  - a) whether photos or articles made a contribution to a debate of general interest;
  - b) the extent to which the person concerned was well known, and the nature of the subject matter;
  - c) the prior conduct of the person;
  - d) the method of obtaining the information;
  - e) the content, form and consequences of the publication; and
  - f) the severity of any sanctions imposed.
- 4) A further feature of these cases is their acceptance that although freedom of expression may extend to publication of photos, this is a particularly sensitive area “[P]hotos may contain very personal or even intimate information”,<sup>9</sup> or as Lord Nicholls memorably put it in *Campbell v MGN*: photos “are worth a thousand words”.<sup>10</sup> However, the ECtHR did not demur from the assertion by one of the third party interveners in *von Hannover (No 2)*, the Media Lawyers’ Association, that article 8 of the ECHR “did not create an image right”.<sup>11</sup>

### B. APPLICATION OF THE KEY PRINCIPLES

#### (1) *Springer*

In *Springer*, *Bild* newspaper had published a front-page article about X, an actor well-known for his portrayal of Superintendent Y in a popular television detective series.

<sup>5</sup> *Springer* at paras 79 and 80.

<sup>6</sup> Para 81.

<sup>7</sup> Para 87.

<sup>8</sup> Paras 90-95.

<sup>9</sup> *von Hannover (No 2)* at para 103.

<sup>10</sup> *Campbell* at para 31.

<sup>11</sup> *von Hannover (No 2)* at para 92. Other third parties included the Association of German Magazine Editors, the Media Legal Defence Initiative, the International Press Institute and the World Association of Newspapers and News Publishers.

The article, accompanied by three photos, reported his arrest by police at the Munich Beer Festival after he had been found to be in possession of cocaine. A second article some months later described X's confession and his criminal prosecution. X did not dispute the essential facts narrated by the newspaper, but sought to prevent future publication of the material. In both instances, the domestic courts granted injunctions and in the second they ordered payment of a penalty. *Springer*, the publisher of *Bild*, applied to the ECtHR arguing that these decisions interfered with its right to freedom of expression under article 10.

On application of the key principles as noted above, the court held that by and large "public judicial facts" did "present a degree of general interest",<sup>12</sup> and that X was a sufficiently well-known actor to qualify as a public figure.<sup>13</sup> He had previously "sought the limelight" by volunteering details of his private life in interviews, and so his "legitimate expectation" of privacy was "henceforth reduced".<sup>14</sup> In relation to criterion 3d), the court found that the publisher had not been entirely straightforward in claiming it had obtained the essentials of the story from a press conference held by the public prosecutor. Nevertheless, the public prosecutor had confirmed its truth, leading the publisher to believe disclosure was lawful. The publisher's "liability did not extend beyond minor negligence," and it had not been shown that it had acted in "bad faith".<sup>15</sup> The articles had contained journalistic language to attract public attention but no "disparaging expression or unsubstantiated allegation", and the newspaper coverage thus far had not been demonstrated to have had adverse consequences for X.<sup>16</sup> An injunction, on the other hand, was capable of exerting a "chilling effect"<sup>17</sup> on the newspaper. Accordingly, notwithstanding the margin of appreciation allotted to the domestic courts in making their assessment, the court ruled that the publisher's right to exercise freedom of expression should have prevailed over X's right to protect his private life from press intrusion. There had been a violation of article 10.

The decision was not, however, unanimous. A dissenting opinion by five of the judges recorded their concern that the court should not assume the role of competent national courts as a "fourth instance" in determining the merits of individual cases, and that their scrutiny should be confined to determining whether "the relevant criteria established in our case-law" had been considered "without any manifest error or omission".

## (2) *von Hannover* (No 2)

In *von Hannover* two German magazines had published photos of Princess Caroline von Hannover of Monaco and her husband, Prince Ernst August, taken while they were on a skiing holiday. An injunction was sought against further publication. The first two photos had shown the royal couple taking a walk through St Moritz and travelling on a chairlift. A third photo, similarly of them walking in St Moritz, had

<sup>12</sup> *Springer* at para 96.

<sup>13</sup> Para 98.

<sup>14</sup> Para 101.

<sup>15</sup> Para 107.

<sup>16</sup> Para 108.

<sup>17</sup> Para 109.

been used as background for an article reporting on the failing health of the Princess's father, the elderly Prince Rainier, and the strains this imposed upon his family. The German domestic courts had granted an injunction with respect to the first two photos, but not with regard to the third. The applicants argued before the ECtHR that their right to respect for their private lives in terms of article 8 had thereby been violated.

The judgment in *von Hannover (No 2)*, released the same day as that in *Springer*, invoked exactly the same criteria to inform the article 8/article 10 balancing exercise. The ECtHR endorsed the reasoning of the domestic courts that the first two photos served entertainment purposes alone, since details of the couple's holiday arrangements did not contribute to a debate of general public interest. However, since the subject of the article accompanying the third photo had been the illness of Prince Rainier, sovereign of Monaco, the ECtHR concurred with the German courts that this was "an event of contemporary society" on which the press was free to report, and it did not question the use of a tenuously-related photo to illustrate that story.<sup>18</sup> The fact that the photos had been taken without the couple's knowledge did not entail that they were taken "surreptitiously" in conditions unfavourable to them.<sup>19</sup> In contrast to *von Hannover (No 1)*, the court was not persuaded that this was against a background of a "climate of continual harassment" of the Princess by the press.<sup>20</sup> Moreover, shots of the couple in a public street in St Moritz were not in themselves "offensive".<sup>21</sup> Accordingly, in refusing an injunction, the domestic courts had not failed to comply with their obligations under article 8 to protect the applicants' private lives. There was no dissenting opinion.

### C. ANALYSIS

Clearly the core criteria applied by the ECtHR were nothing new. They are already established in the court's jurisprudence, and are indeed substantially replicated in the balancing exercise now carried out by the English courts.<sup>22</sup> But while it is of the nature of such factors that their balancing cannot be an exact science, the ECtHR has interpreted them here in such a way as to indicate a perceptible shift towards freedom of expression. Perhaps most notably these judgments suggest an expansive reading of the key concepts of "a debate of general interest" and "public figure".

A debate of general interest is no doubt capable of extending to matters of law enforcement, and a well-known actor's arrest on criminal charges can be seen as relevant to this, but it is curious that the court in *Springer* also took into account the nature of X's television character – a police detective – as reinforcing "the public's interest in being informed of X's arrest for a criminal offence".<sup>23</sup> (Indeed one wonders how far such reasoning could be extended. Is disclosure of a medical condition more

18 *von Hannover (No 2)* at para 118.

19 Para 121.

20 Contrast *von Hannover (No 1)* at para 59 with *von Hannover (No 2)* at para 121.

21 *von Hannover (No 2)* at para 123.

22 See e.g. *McKennitt v Ash* [2008] QB 73.

23 *Springer* at para 99.

readily to be tolerated where the patient plays a doctor in a television series, for example?) This seems to be a straightforward example of a feature which increased the *public's interest* in the story but which had little bearing on its *public interest* value as such.

Perhaps more intriguing, however, is the court's acceptance that a photo of the von Hannovers at a ski resort might contribute to a debate of general interest on the governance of Monaco "at least to some degree". In *von Hannover (No 1)* it was held that:<sup>24</sup>

...the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution since the applicant exercises no official function and the photos and articles related exclusively to details of her private life.

Furthermore, the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.

On that basis photos of the Princess and her family in a variety of locations, including public places, were held to contravene article 8, notwithstanding her status within the reigning family of Monaco. By contrast, *von Hannover (No 2)* seems to indicate recognition that the slenderest of threads can provide a connection to a debate of general interest.

A related consideration in these recent cases is a less differentiated treatment of "public figures" as compared with that in earlier rulings. It was perhaps uncontentious in *Springer* that actor X should be classed as a public figure and that his previous "courting" of the media had a bearing on his expectation of privacy (just as it had for fashion model Naomi Campbell in *Campbell v MGN*). Conversely, the fact that the applicants in *von Hannover (No 2)* had actively discouraged media attention counted for little. This again contrasts with *von Hannover (No 1)*, in which the ECtHR had been careful to distinguish between media coverage of "politicians in the exercise of their functions"<sup>25</sup> and the private life of a public figure like the Princess, who did not exercise official functions. The press had an essential role to inform the public in relation to the former but not the latter.<sup>26</sup> In *von Hannover (No 2)* the court did not trouble over this distinction, burying it under the general observation that, irrespective of the Princess's official functions, she and her husband were not ordinary private individuals and should be regarded as "public figures".<sup>27</sup> On this basis, even individuals who have become "celebrities" unwillingly must find their expectation of privacy diminished.

A further indication of a shift in emphasis is the ECtHR's relatively lenient approach to the photographs having been taken without consent, even by use of

<sup>24</sup> *von Hannover (No 1)* at paras 76-77.

<sup>25</sup> *von Hannover (No 1)* at para 63.

<sup>26</sup> *Ibid.*

<sup>27</sup> Para 120.

a degree of subterfuge. Whereas in *von Hannover (No 1)* the court attributed considerable significance to the applicant's ignorance that photos were being taken, in *Springer* it was prepared to overlook "minor negligence" in the gathering of information where the newspaper could not be shown to have "acted in bad faith".<sup>28</sup> However, it remains to be seen how far such "minor negligence" may be tolerated in the English courts, where the vehicle for protection of private life is misuse of private information. Since this tort has, in turn, evolved out of breach of confidence, the right to protect private information is underpinned by a correlative "duty of confidence," arising "whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential".<sup>29</sup> Such constructive knowledge has in the past been readily imputed to opportunist photographers in leading cases such as *Campbell v MGN*, *Douglas v Hello*,<sup>30</sup> and *Murray v Express Newspapers*.<sup>31</sup> Given the recent adverse publicity surrounding unethical methods of newsgathering,<sup>32</sup> the English courts may not easily change their approach.

Finally, the ECtHR in *Springer* stipulated that in order for article 8 to come into play, an attack on a person's reputation "must attain a certain level of seriousness".<sup>33</sup> This is uncontroversial. But it added that "article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence".<sup>34</sup> Given that most aspects of private life, bar illness, are a "foreseeable consequence of one's own actions", the logical result of this curious assertion is that article 8 would cease to be relevant to most forms of truthful disclosure. It seems unlikely that this was the court's intention and it is to be hoped that this statement is qualified before too long.

In short, these latest European judgments leave intact the structure improvised by the English Common Law for the tort of misuse of private information, and the key criteria applied by the ECtHR broadly correspond with those already accepted in the English courts. However, there has been a discernible degree of realignment towards freedom of expression at the expense of respect for private life. When the Scottish courts eventually come to hear such cases, they will be bound to follow the principles laid down in Strasbourg. Whether they will appropriate English structures to give these principles effect is another question entirely.

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<sup>28</sup> Para 107.

<sup>29</sup> *Campbell* at para 14 per Lord Nicholls.

<sup>30</sup> [2008] 1 AC 1.

<sup>31</sup> [2009] Ch 481.

<sup>32</sup> Notably, the evidence put before the Leveson Inquiry, available at <http://www.levesoninquiry.org.uk/>.

<sup>33</sup> *Springer* at para 83.

<sup>34</sup> *Ibid*, citing *Sidabras and Džiautas v Lithuania* (2006) 42 EHRR 6 (cases involving disclosure of the applicants' past as KGB officers).